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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 FEDERAL TRADE COMMISSION,

4 Plaintiff,

5 v.

20 CV 4432 (LAK)  
Telephone Conference

6 RCG ADVANCES, LLC, ET AL.,

7 Defendants.

8 -----x  
New York, N.Y.  
9 August 14, 2020  
2:08 p.m.

10 Before:

11 HON. LEWIS A. KAPLAN,

12 District Judge

13 APPEARANCES VIA TELEPHONE

14 FEDERAL TRADE COMMISSION  
15 Attorneys for Plaintiff  
16 BY: IONA RUSU GORECKI  
MARGUERITE MOELLER

17 JOSEPH MURE, JR., ESQ. & ASSOCIATES  
Attorney for Defendant RCG Advances, LLC  
18 BY: ANTHONY VARBERO  
DAVID C. CASAGRANDE

19 TERENCE & CONFUSIONE, P.C.  
20 Attorneys for Defendant Ram Capital Funding, LLC  
21 BY: RONALD M. TERENCE  
THOMAS ALTON HARVEY

22 JEFFREY FLEISCHMANN  
Attorney for Defendant Jonathan Braun  
23  
24  
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(The Court and all parties appearing telephonically)

THE COURT: Hi. Okay. I appreciate everybody accommodating this call. I think we can cut through quite a few things. The way we'll handle this, since we have a reporter on the call, is that unless I call on someone by name to speak, anybody who speaks begins by stating his or her name. Understood all around?

MULTIPLE VOICES: Yes.

THE COURT: Okay. The first thing I want to take up is this sealing application, and before we get to the substance of it, I would like to understand exactly what the status quo is.

As near as I can tell, what happened is that the defendants redacted their papers, made images of the redacted papers, filed the images of the redacted papers, and restricted access to the redacted papers electronically to the Court and the lawyers for the FTC. Is that the status quo, Mr. Varbero?

MR. VARBERO: No, your Honor. And I apologize. When I was processing it, I thought I had checked the proper button that the Court and the participants could see it because I think there were two different options, and that was never my intention; so I apologize. I thought I had checked the ones that said access to everybody, but then I subsequently e-mailed both to the Court and everybody. Again, I apologize for filing it in that manner.

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1 THE COURT: I'm sorry. What is it that you e-mailed  
2 to the Court?

3 MR. VARBERO: The unredacted copy and the redacted  
4 filing, as well as to the plaintiff.

5 THE COURT: Andy, have we received any such things?

6 THE DEPUTY CLERK: Judge, I don't think I received  
7 anything else besides what's online, unless I'm mistaken.

8 THE COURT: So, Mr. Varbero, to whom did you e-mail  
9 them?

10 MR. VARBERO: I believe it was  
11 KaplanNYSDchambers@NYSD.

12 THE COURT: Okay. Well, I don't know where you got  
13 the idea to do that, but it doesn't work.

14 MR. VARBERO: I apologize. I had contacted the Court,  
15 and that's why I sent them yesterday at 1:53 a.m. in the  
16 morning. I tried that earlier in the day. The day before I  
17 had contacted the Court. It was my understanding to forward  
18 them to that, both the redacted and unredacted and include the  
19 plaintiff's counsel.

20 THE COURT: Did the plaintiff's counsel get them?

21 MS. GORECKI: Yes, your Honor. We did receive them.

22 THE COURT: Okay.

23 MS. GORECKI: Apologies. This is Ioana Gorecki. In  
24 responding to Judge Kaplan's question about whether we did  
25 receive the documents. We did receive them.

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1 THE COURT: Okay. Well, Mr. Varbero, wherever you got  
2 the idea it should have gone to my JA, you are mistaken. She  
3 is teleworking, and she has no access to the court computer  
4 system and probably isn't going to know they're in her e-mail  
5 for another six weeks.

6 So you're going to have to send them again, and you  
7 should send them to Mr. Mohan.

8 MR. VARBERO: Okay, your Honor. I apologize. Thank  
9 you.

10 THE COURT: Okay. So then what I understand, assuming  
11 this all gets straightened out, what you want to do is you want  
12 me to sign off on the redactions; is that right?

13 MR. VARBERO: That was part of the relief, your Honor.

14 THE COURT: Well, what else was part of the relief?

15 MR. VARBERO: Part of the relief was a TRO because of  
16 a stay because of a --

17 THE COURT: Well, all I'm talking about so far --

18 MR. VARBERO: Oh, yes.

19 THE COURT: -- is the letter motion to seal.

20 MR. VARBERO: Correct, your Honor.

21 THE COURT: Now, with respect to that application, is  
22 there anything else you're asking for, other than for me to  
23 sign off on whatever you redacted?

24 MR. VARBERO: No, your Honor.

25 THE COURT: Okay. Now, whatever you filed on this,

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1 since you're asking for injunctive relief, constitutes judicial  
2 documents. They are presumptively open to the public, both in  
3 common law and under the First Amendment, and there has to be a  
4 specific and particularized showing of a basis for doing  
5 anything else with them.

6 Now, your letter doesn't come remotely close, and if  
7 all there is is your letter, I'm just going to deny it and open  
8 everything up. Now, what would you like to do?

9 MR. VARBERO: Accept the Court's position of denying  
10 and opening it up. It was -- the intent on the seal was not to  
11 obstruct the federal criminal investigation, and that was  
12 really the basis for it. As well as, there could be  
13 detrimental harm to the defendants, but it was more so the  
14 communications with my office and the U.S. Attorney's Office.

15 THE COURT: Well, you put such communications before  
16 me for the purpose of having me consider them in deciding  
17 whether to grant you relief or not; is that correct?

18 MR. VARBERO: Yes, your Honor.

19 THE COURT: All right. Now, is there any reason why,  
20 given the presumption of public access, that those materials,  
21 which you chose to put before me, shouldn't be made public?

22 MR. VARBERO: Not at this time, your Honor.

23 THE COURT: Okay. Well, then I'm going to deny your  
24 letter application.

25 MR. VARBERO: I understand.

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1 THE COURT: Do we understand each other?

2 MR. VARBERO: Yes, your Honor.

3 THE COURT: If at some point you think you can make  
4 the showing required by cases like *Lugosch* and *Amadeo*, you're  
5 free to try, but right now, I haven't got a basis before me.

6 Okay. Now, with respect to a TRO, of course, I don't  
7 know what's redacted from your papers at this moment, but I'll  
8 give you an opportunity to make your case for a TRO orally. So  
9 the floor is yours, Mr. Varbero.

10 MR. VARBERO: Thank you, your Honor. The main reason  
11 for the TRO is because of our clients, Giardina and Richman, or  
12 RCG's, Fifth Amendment protections.

13 The New York State Attorney General's Office, the  
14 Department of Justice, the Manhattan DA and the FTC have been  
15 working together collectively on the same information in  
16 bringing their claims based on the same information,  
17 transactions and occurrences. And I understand a civil stay is  
18 an extraordinary remedy, but here, this case warrants it.

19 The Second Circuit has clearly laid out the test, but  
20 the particular factors in this case, they all overlap on the  
21 same issues in a criminal and civil matter. And one of the  
22 biggest concerns is we cannot openly participate in discovery  
23 because of the way the agencies are working together, or put an  
24 answer in or a motion in the State's -- in the New York State's  
25 AG case, which has criminal cause of action in it, without

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1     waiving our client's --

2             THE COURT: Mr. Varbero, I saw that in your papers,  
3     and it's just not true. They charge you in a civil complaint  
4     that seeks only civil relief with for a violation of the usury  
5     statute, which could be prosecuted criminally but nobody has  
6     charged anybody under. Am I mistaken?

7             MR. VARBERO: Yes, but it can lead to the misdemeanor,  
8     but there are also assault and battery and there are other  
9     charges against the other co-defendants that could be part or  
10    imputed of ours and charged to our client.

11            THE COURT: Has any defendant in this case been named  
12    in any accusatory instrument in a criminal proceeding anywhere?

13            MR. VARBERO: Not at this time, your Honor.

14            THE COURT: Okay. So let's pick it up from there. We  
15    have no criminal charges.

16            MR. VARBERO: But we do know -- we believe it's  
17    stronger than a possibility. We believe it's imminent. And  
18    why I say that, is that we've been told by the United States  
19    Attorney's Office that Mr. Giardina is going to be charged with  
20    federal fraud crimes. Not pending, not if.

21            We had the conversation with the U.S. Attorney about  
22    whether he was the subject or a witness. He's actually a  
23    subject and a target, and even if he cooperated and took a plea  
24    deal, he would not be knocked down to being a witness. So in  
25    the last week, really --

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1 THE COURT: Mr. Varbero, you know, a target is  
2 different than a subject, and a subject is different than a  
3 witness, and even a target is not necessarily going to be  
4 charged.

5 MR. VARBERO: Respectfully, you're correct, your  
6 Honor, but my understanding from the conversations with the  
7 U.S. Attorney's Office, he is inevitably -- or he is going to  
8 be charged criminally.

9 THE COURT: And who told you that?

10 MR. VARBERO: The United --

11 THE COURT: I want a name.

12 MR. VARBERO: -- States Attorney. I was going to get  
13 it. The Assistant United States Attorney Louis Pellegrino.

14 MS. GORECKI: Your Honor, this is Iona Gorecki from  
15 the Federal Trade Commission. At some point, I would also like  
16 to respond to this, whenever your Honor gives me the chance.

17 THE COURT: Well, of course.

18 Okay. Go on, Mr. Varbero.

19 MR. VARBERO: Based on those circumstances and facts,  
20 the issue is that you have a civil federal agency moving  
21 forward with their case, and we know it's imminent that pending  
22 criminal charges are going to be brought against our client,  
23 and if we don't answer in this case in front of you, your  
24 Honor, they could move for a default.

25 So like the papers say, we're in somewhat of a rock



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1 and a hard place in dealing with constitutional protections and  
2 handling the civil suit. And as stated in my -- in the reply  
3 that was filed, you know, there is case law in the Southern  
4 District that says in the interests of justice, when it's  
5 required or if there's civil and criminal cases, the Court can  
6 grant a stay.

7 And simply based on the fact that any communications  
8 from our clients that move to dismiss or to answer or  
9 participate would waive those rights is our concern.

10 THE COURT: Well, let's take them one at a time.  
11 Suppose your client makes a motion to dismiss the civil case,  
12 how does that implicate Fifth Amendment rights?

13 MR. VARBERO: My understanding, your Honor, is any of  
14 the communications then open up the door that he's actively  
15 participated in the case and waived his Fifth Amendment right.

16 THE COURT: I think you misunderstand the law pretty  
17 grievously. If he makes a motion to dismiss under rule  
18 12(b)(6), what he's saying is if all the facts alleged by the  
19 FTC are true, the FTC loses anyway because the complaint's not  
20 sufficient as a matter of law. Right?

21 MR. VARBERO: Yes, your Honor.

22 THE COURT: Okay. So a motion to dismiss does not  
23 necessarily implicate anybody's Fifth Amendment rights. True?

24 MR. VARBERO: Yes, your Honor. But respectfully, this  
25 Court ruled yesterday on the 12(b)(6) motion in regard to one

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1 of the co-defendants -- okay, there are factual allegations in  
2 the case; so even if we did put in a 12(b)(6) motion, the  
3 likelihood is it would be denied based on the precedent that I  
4 said. And then the next step would be to put an answer in and  
5 to get into the factual facts of the case.

6 THE COURT: Mr. Varbero, the fellow who made the  
7 motion to dismiss that I denied yesterday put in an affidavit  
8 in which he specifically addressed key factual allegations  
9 against him. And by doing that, although I'm not pre-judging  
10 the issue, he may very well have waived the Fifth Amendment  
11 voluntarily, right out of the get-go. Right?

12 MR. VARBERO: I understand, your Honor. It's just  
13 that in light of the overlapping facts and the parallel, what  
14 will be a criminal case, we believe, and a criminal  
15 investigation all stems from all these agencies working  
16 together and sharing information.

17 THE COURT: Mr. Varbero, I don't know, do I, for  
18 certain whether there will be any criminal charges. If I were  
19 to assume that there would be criminal charges, I don't know  
20 what they would be and, therefore, I can't really assess the  
21 extent to which, if any, that the facts overlap between the  
22 FTC's case and whatever criminal case might be brought, if any.  
23 Isn't that true?

24 MR. VARBERO: I understand. Yes, your Honor.

25 THE COURT: Okay. One more question for you,

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1 Mr. Varbero. What's going to happen in the next two or three  
2 weeks that would force your clients to choose between remaining  
3 silent and suffering a default in this case?

4 MR. VARBERO: The fact that waiving the Fifth  
5 Amendment participating in the case, it may warrant three  
6 weeks. It still stands to be the same if the U.S. Attorney is  
7 bringing the criminal charges based on the overlapping facts  
8 and same information. I mean, you have the detective from the  
9 NYPD who gathered all the information for two years between the  
10 State -- between the agencies and walked it across the street  
11 to the U.S. Attorney's Office.

12 THE COURT: What steps have to be taken in this  
13 lawsuit in the next three weeks by your clients?

14 MR. VARBERO: Either move to dismiss or answer.

15 THE COURT: Is the FTC prepared to extend their time  
16 to answer or move if they request it? Ms. Gorecki?

17 MS. GORECKI: Yes, your Honor, this is Iona Gorecki  
18 for the FTC. We would prefer to maintain the timetable that is  
19 currently before the Court. Obviously, Judge, if you decide  
20 differently, we would go along with that, but we would prefer  
21 to maintain the current timetable.

22 THE COURT: All right. Anything else, Mr. Varbero?

23 MR. VARBERO: No, your Honor.

24 THE COURT: Okay. Anyone else on the defendant's side  
25 want to be heard?

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1 MR. HARVEY: No, Judge. Tom Harvey.

2 THE COURT: Okay. Then -- did I miss someone?

3 Mr. Fleischmann?

4 MR. FLEISCHMANN: Nothing from me, your Honor. Thank  
5 you.

6 THE COURT: Okay. Ms. Gorecki?

7 MS. GORECKI: Yes, your Honor.

8 THE COURT: On the TRO?

9 MS. GORECKI: Yes, your Honor. The first thing, and I  
10 agree with all the points your Honor raised. There's no  
11 indictment here. The attempt to somehow convert the Newark  
12 AG's case into a criminal case because it references a couple  
13 of penal statutes is simply not correct. The suit is brought  
14 under a civil law, under executive law 6312. The relief sought  
15 is civil.

16 And in addition, you know, the reason I jumped in  
17 before and, you know, what I wanted to note is that I'm  
18 concerned that, as your Honor stated, you have to have a chance  
19 to look at the unredacted versions of the affirmations and the  
20 memo. And I'm concerned because the representations that  
21 Mr. Varbero made today regarding how imminent this potential  
22 criminal prosecution is and the fact that, you know, he was  
23 told that, not maybe Mr. Giardino would be charged, but that he  
24 would be charged, it just doesn't line up with the affirmations  
25 that they submitted in support of even their TRO motion.

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1           The affirmations they submitted are much more vague.  
2       They do say that the -- Mr. Giardino is a subject, he's not a  
3       target, and it really is unclear where the support is for the  
4       idea that he is going to be charged for sure, definitely, no  
5       question about it. I don't see that anywhere in the  
6       affirmations that counsel submitted.

7           THE COURT: Okay. I'm sorry, go ahead.

8           MS. GORECKI: Sorry. Additionally, another thing that  
9       I wanted to bring up was that in addition to the lack of an  
10      indictment, here we're not talking about a private plaintiff's  
11      interest. We are talking about civil law enforcement agency.  
12      We are charged with protecting consumers in the marketplace,  
13      and so the public interest here and the FTC's interests are  
14      merged and weigh strongly against a stay.

15           And so it's certainly much more compelling than it  
16      would be if it were simply a private plaintiff, and at the same  
17      time, the burden on the defendants is minimal. I mean, to the  
18      extent that -- your Honor, it is not even clear who is bringing  
19      the stay.

20           So if we take a look at, you know, the notice of -- or  
21      electronic filing, they said it was brought on behalf of all of  
22      the defendants. But when you look at the actual motion to  
23      stay, it apparently was only brought on behalf of, I think, it  
24      was Giardina, RCG and Ram Capital Funding.

25           And then when we look at the defendant's affirmation,

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1 it says that it's in support of, I think it's, RCG, Giardina  
2 and Michelle Gregg, who is not even a defendant in this case.  
3 So as a side note, we're not even sure who is bringing the  
4 motion to stay.

5 But aside from that, to the extent that it's a  
6 corporation, they don't have a Fifth Amendment right; so the  
7 burden is mirrored there. And as your Honor noted, given  
8 there's no indictment, there's not even a subpoena by a grand  
9 jury, that the Fifth Amendment privilege or the burden on it is  
10 minimal at this time.

11 THE COURT: Okay. I'm not going to grant a TRO. I  
12 see no cognizable threat of irreparable injury before the  
13 motion can be briefed and argued in a normal course.

14 Let's see if we can agree on a briefing schedule and  
15 obviate the need for expedited anything. How much time does  
16 the FTC want to respond to the motion, assuming that that order  
17 to show cause is regarded as a notice of motion?

18 MS. GORECKI: Your Honor, again, this is Iona Gorecki.  
19 We have already submitted an opposition to the motion this  
20 morning at, I believe, around 10:30 a.m.

21 THE COURT: Well, I've seen it. Is that satisfactory  
22 to you for me to go ahead and decide what amounts to, not a  
23 TRO, but to a preliminary injunction?

24 MS. GORECKI: Yes, your Honor. I believe that we are  
25 satisfied that the motion that we submitted this morning would

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1 be sufficient to decide the preliminary injunction issue.

2 THE COURT: And what about the defendants?

3 Mr. Varbero? I've had the replies from two groups of  
4 defendants. Are the defendants prepared to have me go ahead  
5 and rule on this motion --

6 MR. VARBERO: Yes, your Honor.

7 THE COURT: -- without further briefing? Mr. Varbero,  
8 is that right?

9 MR. VARBERO: Yes. Mr. Varbero. Right.

10 THE COURT: And Mr. Terenzi?

11 MR. TERENZI: Your Honor, we're not part of that  
12 motion.

13 THE COURT: Okay. Mr. Fleischmann?

14 MR. FLEISCHMANN: Your Honor, Mr. Braun is also not  
15 part of that motion. I believe that counsel probably just  
16 checked the boxes incorrectly when he filed it, but we were not  
17 part of the motion.

18 THE COURT: Okay. So I will mark this as submitted as  
19 of now, and you'll get a decision in due course.

20 Okay. Anything else we can usefully accomplish this  
21 afternoon?

22 MR. WHITE: Your Honor, this is Michael White for the  
23 Federal Trade Commission. My pro hoc admission, I think it's  
24 ECF 7, is still pending, and I had to resubmit it for a minor  
25 technical error. I was just hoping it could be considered and

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1 entered, if appropriate. Thank you.

2 THE COURT: Okay. All righty.

3 MR. VARBERO: Your Honor?

4 THE COURT: Yes.

5 MR. VARBERO: I apologize. It's Anthony Varbero. Our  
6 answer is due today, and I know you had raised the extension.  
7 We had reached out to the FTC to see if they would grant the  
8 extension and we received the same position that they wouldn't.  
9 We would just respectfully ask time to put an answer in pending  
10 the decision of this motion.

11 THE COURT: What's the commission's view?

12 MS. GORECKI: Your Honor, to the extent that  
13 Mr. Varbero says he has reached out to us, we've never  
14 discussed an extension of the motion to dismiss or an answer.  
15 I was not party to any conversations, but our position is that  
16 they should remain the same.

17 Defendants knew about the criminal investigation, upon  
18 which they base this motion to stay, a couple of weeks ago.  
19 They could have filed this motion a couple of weeks ago, once  
20 they found out, and then still been able to file their answer  
21 or motion to dismiss today, per the schedule. We believe the  
22 schedule should remain in place.

23 MR. VARBERO: Your Honor, could I comment on that for  
24 a moment? It's Anthony Varbero.

25 THE COURT: Yes.



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1 MR. VARBERO: So we had -- my office and co-counsel  
2 had several conversations with Mr. Pellegrino and Detective  
3 Nicolosi, and there was one at the beginning -- or the end of  
4 June, the beginning of July, and then we didn't reconvene again  
5 until the middle of this week. And when it became clear -- and  
6 it wasn't initially so clear that they were actually being  
7 indicted until this week; otherwise, we would have brought the  
8 motion two weeks ago.

9 Again, with regard to when I checked the box, if I  
10 didn't correctly check the box again is because the plaintiff  
11 had named RCG Advances, and I did it in error as an "also known  
12 as" Ram; so I apologize on that. We don't represent them. I  
13 just want to clarify that. But their name is operating as a  
14 Ram Capital Company or d/b/a.

15 THE COURT: Okay. I'll give you another week to  
16 answer or move, Mr. Varbero. But the date is August 21.

17 MR. VARBERO: Thank you, your Honor.

18 THE COURT: Okay. Thanks, everybody.

19 MR. VARBERO: Thank you, Judge.

20 MS. GORECKI: Thank you.

21 THE COURT: Bye, bye.

22 (Adjourned)  
23  
24  
25